No. 91-1014

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL LACHTERMAN,

Petitioner,

v.

STATE OF MISSOURI

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Eastern District

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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STATEMENT OF THE CASE

Petitioner, Michael Lachterman, was convicted of two counts of sodomy of a minor boy in violation of § 566.060 RSMo 1986, and sentenced as a prior and persistent offender under § 558.016 and 558.018 to two consecutive thirty year sentences. Petitioner filed a direct appeal and a motion to vacate, set aside, or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. Petitioner's Rule 29.15 motion was consolidated with his direct appeal. The facts relating to petitioner's offense are summarized in the opinion of the Missouri Court of Appeals, Eastern District, affirming petitioner's conviction, sentence, and the denial of post-conviction relief. **State v. Lachterman**, 812 S.W.2d 759 (Mo.App. 1991).

ARGUMENT

I. Constitutionality of Search Warrant

Petitioner challenges the trial court's ruling admitting various items seized pursuant to a search warrant. Specifically, petitioner claims that the search warrant authorizing the seizures was invalid in two respects. First, he argues that the items described in the warrant were "too general as to what was to be seized and provided no guidelines to the searching officers". Secondly, he claims that the affidavit supporting the warrant lacked information demonstrating the reliability of its sources and specificity as to the dates on which the alleged sodomy victims obtained their information. Based on these alleged deficiencies, appellant argues that items seized pursuant to this warrant should have been suppressed at trial.

Specificity of Items to be Seized

Appellant first contends that the warrant authorizing the search and seizure did not state with particularity the items to be seized. The application for search warrant provided that:

> Ptn J.A. McLain, Olivette Police Department, being duly sworn deposes and states upon information and belief that at the premises known, numbered and designated as: Number 59 Pricewoods, including a 1979 Chevrolet automobile, License RHL 137, that is located in an attached garage is being used for the purpose of secreting pornographic material, controlled substances, and instrumentalities of the crime of sodomy.

Appellant specifically argues that the terms "pornographic material", "controlled substances",[1] and "instrumentalities of the crime of sodomy", failed to comply with the statutory requirements, in that such designations did not provide sufficient guidelines for the searching officers.

The Fourth Amendment prohibits "general warrants" in an effort to prevent exploratory rummaging in a person's belongings. **Coolidge v. New Hampshire**, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971). "A warrant is valid if the description is sufficiently definite to enable the executing officer to reasonably ascertain and identify the place to be searched and the objects to be seized. **Steele v. United States**, 267 U.S. 498, 503-04, 45 S.Ct. 414, 416, 69 L.Ed.2d 757 (1925). However, when applying this constitutional standard, there is a "practical margin of flexibility", therefore, the warrant need only be "sufficiently definite" to measure whether given the specificity in the warrant, a violation of personal rights is likely. **United States v. Johnson**, 541 F.2d 1311, 1313 (8th Cir. 1986). The degree of specificity may necessarily vary according to the circumstances and type of items involved. **U.S. v. Porter**, 831 F.2d 760, 764 (8th Cir. 1987).

Where the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice if such standards reasonably guide the

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[1] The controlled substances discovered during the search were not admitted at trial.

officers in avoiding the seizure of protected property. See, **Andresen v. Maryland**, 427 U.S. 463, 479-82, 96 S.Ct. 2737, 2748-49, 49 L.Ed.2d 627 (1976) (upholding warrant authorizing the seizure of "other fruits, instrumentalities and evidence of crime at this [time] unknown"); **United States v. DeLuna**, 763 F.2d 897, 908 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985).

In this case, the terms used to describe the items to be seized were sufficient under the circumstances.[2] However, assuming, only for purposes of argument, that the terms "pornographic material" and "instrumentalities of the crime of sodomy" were insufficient the fact remains that authorization to search for "controlled substances" was sufficiently particular to eliminate unnecessary discretion on the part of searching officers. The term "controlled substance" is a term used to designate the class of substances which are prohibited under Chapter 195, Missouri Revised Statutes (amended 1989). Specifically, the term "controlled substance" as designated in that chapter "means a drug, substance, or immediate precursor in Schedules I through V listed in this chapter". § 195.010(6), RSMo 1986. These schedules set forth the specific drugs which fall within the statute's purview, and therefore constitute "controlled substances". The term "controlled substances" there-

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[2] **Andresen v. Maryland**, 96 S.Ct. at 2748, (use of term "together with other fruits, instrumentalities and evidence of [the] crime" was not constitutionally infirm).

fore encompasses only the substances listed in the designated schedules. The meaning of "controlled substances" leaves nothing to the discretion of searching officers. Only those substances listed in the enumerated schedules are considered "controlled substances". As a result, only those specific substances fall within the scope of the warrant. Under these circumstances, an officer is completely limited in the items he may seize.

In fact, although Missouri courts have yet to determine the validity of naming "controlled substances" in a search warrant, other state's have explicitly upheld this term as a sufficiently particular description of items to be seized. **State v. Quitana**, 87 N.M. 414, 417, 534 P.2d 1126, 1130 (N.M. Ct.App. 1975) ("The words 'controlled substances . . . contrary to law', used in the warrant have a definite meaning in that they refer to certain and definite lists of drugs and their derivatives. Nothing was left to the discretion of the officers"). **Hagler v. State**, 726 P.2d 1181, 1183 (Okl. Crim.App. 1986) (The description upheld was "certain controlled substances . . . consisting of narcotics, marijuana, hallucinogens, barbiturates and stimulants"). The logic employed in these cases is clearly applicable to the present warrant, therefore the term "controlled substance" was sufficiently particular to control police discretion.

Since the term "controlled substances" was sufficiently particular to support the warrant and subsequent search and seizure, the validity or invalidity of the other terms in the warrant is immaterial. "[A]bsent a showing of pretext or bad

faith on the part of police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution." **United States v. Fitzgerald**, 724 F.2d 633, 636-637 (8th Cir. 1983). See also, **Lebron v. Vitek**, 751 F.2d 311, 312 (8th Cir. 1985). Thus, where a search warrant establishes the necessary probable cause to search one distinct person or place but is insufficient to justify the search of another described therein, it has been held by a majority of circuit courts that the valid portion of the warrant may be severed and a search conducted in accordance with the valid portion of the warrant is proper. See, **United States v. Riggs**, 690 F.2d 298 (1st Cir. 1982) (adopting severance); **United States v. Christine**, 687 F.2d 749 (3rd Cir. 1982) (adopting severance); **United States v. Cook**, supra, 657 F.2d 730, 734-36 (5th Cir. 1981) (adopting severance); **United States v. Freeman**, 685 F.2d 942, 952-53 (5th Cir. 1982) (admitting evidence discovered in plain view during execution of the valid portions of a severed warrant); **Sovereign News Co. v. United States**, 690 F.2d 569, 576 (6th Cir. 1982) (adopting severance), cert. denied, ____ U.S. ____, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983); **United States v. Cardwell**, 680 F.2d 75 (9th Cir. 1982) (endorsing severance but holding warrant in question not susceptible of severance).

Considering that the warrant was valid as to justify the ensuing search for controlled substances, the only remaining question is whether the other articles were seized in plain view, within the scope of the search warrant. See, **Fitzgerald**, supra at 637. According to the record, the

videotape, magazines, and tennis shoes were discovered in locations likely to contain controlled substances. Thus, the seizure of those articles clearly fell within the scope of the warrant in that they were discovered in the pursuit of specific items contained in the warrant. Based on the foregoing therefore, respondent's submit that petitioner's challenge to the specificity of the items described in the warrant is without merit.

Sufficiency of Affidavit Supporting Search Warrant

Appellant next argues that the search warrant was deficient because it was based upon an affidavit which lacked any information as to the reliability of the sources of information (the victims) and as to dates when the alleged sodomy victims obtained their information and conveyed it to the officer. In this case, the affidavit was based upon information obtained directly from the victims. Specifically, the affidavit stated that:

> [A]ffiant states that he has reason to believe such goods are being secreted therein because: sodomy victim, Shaun Mack, and sodomy victim Gary Mack have stated to this office that at the above residents and in the aforementioned vehicle, Michael Lachterman had marijuana, pornographic material, and a large amount of money that was used to pay minors to attract them for sexual activity.

When an affidavit is based upon statements from the crime victim, the safeguards used to ensure reliability of the information contained therein are simply inapplicable. See, i.e. **Illinois v. Gates**, 462 U.S. 213, 242-245, 103 S.Ct. 2317, 2334-2335, 76 L.Ed.2d 527 (1989) (totality of the circumstances

tested used to determine reliability of an informant); **Plant v. State**, 781 S.W.2d 245 (Mo.App. E.D. 1989). The concerns of reliability arise when hearsay statements of an informant are used, thus increasing the chances of reliance on a reckless and prevaricating tale. Id. Here, we are not dealing with the hearsay statements from a "mere informant". Rather, the affidavit was based on statements from the sodomy victim. Consequently, the concerns of relying on a reckless or prevaricating tale that exist where a mere informant is involved is absent in this case.

Finally, petitioner contends that the warrant was insufficient because it failed to specify the date upon which the victims obtained their information. In determining whether a warrant is "stale", the court must look at all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property seized". **United States v. Foster**, 711 F.2d 871, 878 (9th Cir. 1983), cert. denied 465 U.S. 1103, 104 S.CT. 1602, 80 L.Ed.2d 132 (1984). "Staleness", as used by petitioner has been interpreted to mean an unreasonable delay between the issuance of the warrant and it's execution. **United States v. McCall**, 740 F.2d 1331 (4th Cir. 1984). In this case, police applied for the search warrant two days after the sodomy occurred. (See, Petitioner's statement of the case, at 3; Petitioner's Appendix D). There is no allegation or evidence that the execution of the warrant was delayed. Petitioner's only claim is that the warrant did not contain the dates on which the information was obtained.

In the first instance, the application's failure to state a date certain is not fatally defective since by the language of the application it is clear that those items sought were currently being secreted; i.e. " . . . is being used for the purpose of secreting". The use of present tense in describing the events indicates they were sufficiently timely, especially considering that the application was made only two days after the sexual assault occurred. See, i.e. **Guzewicz v. Slayton**, 366 F.Supp. 1402 (E.D. Va. 1973); **Borras v. State**, 229 So.2d 244 (Fla. 1969); **Walker v. State**, 140 Ga.App. 418, 231 S.E.2d 386 (1976); **State v. Hennon**, 314 N.W.2d 405 (Iowa 1982); **State v. Boudreaux**, 304 So.2d 343 (La. 1974); **Commonweath v. Atchue**, 393 Mass. 343, 471 N.E.2d 91 (1984); **State v. Anderton**, 668 P.2d 1258 (Utah 1983); **State v. Clay**, 7 Wash.App. 631, 501 P.2d 603 (1972). Simply because the warrant did not contain the dates of the assault would not render it invalid since the Magistrate may consider all the facts and circumstances of the case, **Foster**, supra, at 878, in deciding whether to issue the warrant.

In any event, assuming the warrant did not indicate timeliness, such does not render it invalid since the nature of the crime, sodomy, did not require chronological specificity. As recognized by Missouri Courts, time is not of the essence in sexual crimes. **State v. Hoban**, 738 S.W.2d 536 (Mo.App. 1987); **State v. Meyers**, 770 S.W.2d 312 (Mo.App. 1989). Thus, because the instrumentalities which may be used in sodomy are not of an extinguishable nature, timeliness is not imperative. In this case, the items sought, pornographic material, controlled sub-

stances, and other instrumentalities of the crime were believed to be stored in plaintiff's home. These items were identified by the victims as items used to enhance his gratification during the sexual acts. Since according to the victims, the sexual encounters were continuing in nature, there was no reason to believe these items would have been destroyed or consumed. Therefore, the failure to identify a date certain in the warrant application did not render it fatally defective.

Conclusion

In view of the foregoing, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that a true and correct copy of the Brief of Respondent in Opposition to Petition in the case of **State of Missouri v. Michael Lachterman**, was mailed, pursuant to Supreme Court Rule 28.5(b), postage prepaid, this _____ day of March, 1992, to:

Irl B. Baris
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JOHN M. MORRIS, III